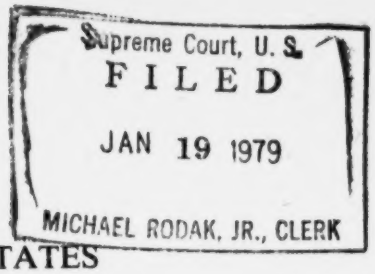
78-1138



BEFORE THE UNITED STATES
SUPREME COURT

Laura and Mamie Barker,
Petitioners

vs

Commodity Futures Trading
Commission, Respondent

5th Circuit Court of
Appeals No. 78-3141

(CFTC No. R 77-96)

PETITION FOR WRIT OF CERTIORARI

Petitioners are not represented by counsel. Service may be made upon us at the following address:

Mrs. Mamie Nutter Barker and
Miss Laura Bernice Barker
1700 Lucile Street
Wichita Falls
Texas 76301

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PETITION FOR WRIT OF CERTIORARI

May it please the Court, for reasons explained below, I Laura Bernice Barker, have to represent my mother and myself, so I humbly beg the Court's indulgence. This is the very best effort I know how to make.

The Deputy clerk of the United States Fifth Circuit Court of Appeals has kindly informed us that, owing to that Court's rulings, our only recourse is to petition the Supreme Court for a writ of certiorari. (His letter appended herewith.) Accordingly, I am striving to follow adequately the outline set forth in Rule 23, Rules of the Supreme Court, in the Appendix to Title 28, United States Code, 1976 edition. *Please* let this document be found acceptable, both in form and substance. Thank you.

1a) Lower court opinions: The Fifth Circuit Court of Appeals never delivered an opinion on the

merits of our case. That is our problem; we cannot get anybody to examine our evidence and actually adjudicate it, although we contend that we have a fundamental civil right to adjudication. Two provable crimes have been committed against us, fraud and churning of our commodity account, by a brokerage house and the company it sponsored.

But the Commodity Futures Trading Commission has thrown our case into legal limbo by its refusal to abide by two of its own rules and by its further refusal to interpret the law in accordance with the unanimous definition of all the dictionaries of the English language; and the Appeals Court has ignored both issues, not ruling one way or the other, and has further allowed one of the defendants to intervene to keep it in limbo.

The Appeals Court says we have not exhausted all our remedies but it refuses to tell us what these remedies are, and the CFTC Rules Booklet certainly doesn't say; we have been through the whole procedure in it. Yet the oldest civil right in the common law is the right to know what the law is, i.e., to be informed of our remedies.

Therefore, we contend that two arms of government, the CFTC and the Appeals Court, have denied us our civil rights and the due protection of the laws of the United States, and we urgently pray the Supreme Court to grant us appropriate relief.

1b) Grounds of jurisdiction: The Supreme Court has jurisdiction over Appeals Courts and federal agencies.

We seek a review of the Appeals Court's order of December 21, 1978, denying our motion to reverse its dismissal order. We are appending both orders.

I believe the statute is probably Title 28,

Chapter 81, Section 1254, paragraph 1, U. S. Code, 1976 edition, Volume VIII, page 157: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

1c) Federal Questions: Can the Appeals Court construe Title 7, Chapter 1, Section 18, paragraph g to mean final orders only, when that law says "any order"?

Shall the Commodity Futures Trading Commission be allowed to construe the word "claims" contrary to *all* the dictionaries of the English language, including legal dictionaries, and contrary to centuries of established legal usage?

Shall the Appeals Court be allowed to overlook this erroneous usage and just not address the matter at all?

Can the CFTC ignore two of its own rules regarding complainants' rights to alternative forms of redress?

Can the Appeals Court and the federal agency combine to leave our case in a condition where it cannot be adjudicated, thereby violating our civil right to obtain judgement?

Can the Appeals Court refuse to tell us what our remedies are when it says we have not exhausted them and the CFTC Rules Booklet does not set forth any more procedure — nor does the Commodity Exchange Act — and we have asked the Court what to do to avoid being left without legal redress?

Can the Appeals Court and/or the federal agency just ignore and refuse to take into account the string of circumstances which points towards obstruc-

tion of justice, including possible crimes of suborning lawyers and/or possibly bribing state or federal personnel, when we have brought these matters to their attention and explained that we have been prevented from obtaining an investigation?

If the Justices wish to address any other questions — implicit rather than explicit — herein contained, will they please do so.

1d) Laws cited: Our civil right to adjudication and our civil right to be informed of our remedies derive from the ancient common law.

Our right to adjudication further derives from the United States Constitution, Article XIV, paragraph 1, latter portion: "...nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." I believe this has been held to apply to the States collectively also, i.e., to the federal government.

The pertinent portions of the Commodity Exchange Act are these: Title 7, Chapter 1, Section 18, paragraph i, U. S. Code, 1976 edition, Volume I, page 884: "The provisions of this section shall not become effective until fifteen months after October 23, 1974: *Provided*, That claims which arise within one year immediately prior to the effective date of this section may be heard by the Commission after such fifteen months period."

(The above paragraph refers to the Reparation Procedure, and the date in question is January 23, 1975.)

Also Title 7, Chapter 1, Section 18, paragraph g, U. S. Code, 1976 edition, Volume I, same page (884): "Any order of the Commission entered hereunder shall be reviewable on petition of any party

aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located, under the procedure provided in section 9 of this title." Remainder of paragraph deals with posting bond, which did not apply, since we were the plaintiffs.

And Title 7, Chapter 1, Section 18, paragraph e, U. S. Code, 1976 edition, Volume I, page 883: "If after a hearing on a complaint made by any person under paragraph (a) of this section, or without a hearing as provided in paragraphs (b) and (c) ... the Commission determines that the respondent has violated any provision of this chapter, or any rule, regulation, or order thereunder, the Commission shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order." Remainder deals with undisputed amounts.

And Title 7, Chapter 1, Section 18, paragraph b, U. S. Code, 1976 edition, Volume I, page 883: "If there appear to be, in the opinion of the Commission, any reasonable grounds for investigating any complaint made under this section, the Commission shall investigate such complaint and may, if in its opinion the facts warrant such action, have said complaint served by registered mail or by certified mail or otherwise on the respondent and afford such person an opportunity for a hearing thereon before an Administrative Law Judge designated by the Commission in any place in which the said person is engaged in business:" Remainder waives hearings in amounts under $2500.

And paragraph (a) immediately above it also

says: "...if, in the opinion of the Commission, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Commission to the respondent,..."

And from the CFTC Rules Booklet, Commodity Futures Trading Commission Reparation Proceedings, Federal Register, January 27, 1976, page 4003: "If the Commission should determine not to procede in the manner set forth in 12.31 above, the reparation proceeding shall terminate without prejudice to the right of the complainant to seek such alternative forms of relief as may be available to him."

1e) Description of the case: I am sorry there are so many pertinent facts to cover, but this has turned into a rather complicated case.

For several years my mother and I had been satisfied with our stock market account at E. F. Hutton, which we had inherited when my father died. At no time have we accused our broker of any wrongdoing, for he himself also lost money in this scheme, and when things began to go wrong he tried to rescue his customers but couldn't.

We, the plaintiffs, contend that the fault lay with the Hutton headquarters and the company they sponsored, Commodity Management Systems, Inc. The latter undertook to provide daily computer buy and sell signals to the broker, not to the client, for immediate execution.

We were more than ordinarily skeptical of commodity trading because my father had lost money in that way and we were firmly convinced it was not for us. However, we were persuaded by our broker's representations and his obvious enthusiasm. He sold us a $20,000 account (plus $2000 fee) and on May 7, 1974 our commodity trading began.

Soon our troubles began too. In several provable ways Commodity Management Systems failed utterly to provide either the risk protection or the actual services described in their brochure, and they also committed acts of gross negligence. For instance, switching contract months without informing the broker, etc. In one month alone their own figures from their own computer printout show an $18,000 loss on their $20,000 model account! Their brochure quoted the average sized loss (per single trade) at $441, in contrast to actual single losses above $3000, $4000, even $6000!

Yet the mathematical method they said they used is considered a standard technique for estimating stresses on aircraft wings, dams, and a variety of other engineering and economics problems. So it couldn't be *that* far wrong. We charge deliberate choice of runaway risk levels. And there are other provable points too.

However, we did not immediately recognize the fraudulent nature of the scheme. It was Watergate Summer and we thought the markets were just reacting to public hysteria. Therefore our broker asked for and received permission from Commodity Management Systems to try to modify their program to protect his customers.

But that only made it worse, and one hectic day when he was unable to execute the signals because of a lopsided market, we were forced off the program for good. I then tried to shut down our account but was unable to do so because he misunderstood my instructions.

Then I insisted that since E. F. Hutton had gotten us into this, E. F. Hutton would either get us out or we would go see a lawyer. Immediately arrangements were made to have a vice-president take over and run our account as a problem account in an

attempt to restore the equity.

This man almost brought off a brilliant recovery, but killed it by an incredible act of folly — he shorted seven corn contracts immediately after news of frosts in the corn belt — and ended by aimlessly churning our account for several weeks until our broker stopped him. He ran up $2500 worth of commissions on what had fallen to an $8 to $9000 equity and left that equity lower than when he took it.

Next our broker arranged for a team of experts from his regional office to take over these battered accounts. However, they declined to accept any responsibility for restoring our money, and when we in turn declined to sign the release that says the customer is trading at his own risk, we had to part.

In the meantime Hutton had severed its business connections with Commodity Management Systems and presumably settled in some manner with their largest customers, whose accounts had been handled directly. But in no way could we persuade them to settle with us.

So at last we did see a lawyer and he filed a Texas civil suit in June, 1975.

At this point began a series of circumstances that appear to involve further crimes, but we have been unable to obtain any investigation.

We suspect that our lawyer may have been brought off. For eleven months he did exactly nothing. (It took him six months to figure out that the second defendant could be served the papers at his business address instead of searching for his residence!) Also we later learned *that this suit is so incompetently drafted that it cannot be taken to court* as it stands, and I don't know if it can be changed.

Yet when we told him either to get on with it or face a complaint to the Bar, his sole reply was to appear before the judge without notice to us and drop

the case.

But whereas we only suspect him of being bought off, we are firmly convinced that his successor was. (Both are among the most prominent attorneys in town.)

Where the first one had offered only passive resistance, the second one actively fought me, attempting to force us into a ruinous settlement. Neither would file complaints to federal or state agencies, despite our request, and this one refused to take any of several other steps; for instance, a class action suit would have turned our broker into a plaintiff with us, for he too lost money on an account of his own.

Moreover, this lawyer also refused to take advantage of an extraordinary coincidence. The other local Hutton co-manager had recently been fired for tampering with his customer's accounts and turned to outright burglary of wealthy homes. He was convicted and sent to jail in a sensational trial, and Hutton certainly couldn't have faced a jury with its second co-manager right after that, yet this lawyer refused to take our case to trial.

When I asked him to request performance figures on Hutton's own managed accounts as a possible settlement basis, he reported back that Hutton had no such figures, but they *imagined* they had lost money!

We were unable to obtain a criminal investigation however, because the State of Texas attorney general's office declared that the Commodity Futures Trading Commission had jurisdiction, while the CFTC declared that it had no jurisdiction over lawyers.

There was something strange about this too. First the state of Texas entertained our whole complaint, requested specific information, replied (to in-

quiries) that they were working on it, and then later confessed that they were not. Why did they first accept the whole case and then drop it? Without notice to us.

In acute desperation I wrote to the United States Attorney in Ft. Worth to ask how to file a federal case myself and he forwarded my letter to the CFTC.

The Commission's investigative staff told us we should be eligible for the CFTC Reparation Procedure, which we followed with laborious effort right up to the point where they promised to assign a hearing date. But when our case went to the administrative law judge for that purpose, he dismissed it on three technicalities (see below) which we believed had already been decided in our favor. It stayed on his desk for *one day*.

Our Application for Review stayed on somebody else's desk for *one year*. Requests to find out what had become of it went unanswered, and it finally took a letter to our Senator to blast it loose.

Frankly, we regard this whole chain of events as suspicious.

And when the Commission finally did act on our Application for Review, they vacated their judge's order but replaced it with a stay. They wanted us to withdraw our lawsuit *before* they would even rule on whether they would adjudicate the case!! Was this collusion to slick us out of legal redress?

If this be a proper place to ask for a Justice Department investigation, then we hereby do so.

The upshot of this sorry affair is that the CFTC finally barred consideration of all but four trades amounting to about a $500 loss, for reasons summarized below, but it hung onto those four.

This is the order that the Appeals Court regards as "not final," although it throws our whole

case into limbo where it cannot be adjudicated. I shall explain why in a moment.

We asked the Appeals Court either to judge the case itself or else to order the CFTC to judge the whole thing, not just less than 1% of it; but they refused to do either and allowed Hutton to intervene. Then we asked the Court to tell us what to do in order to obtain adjudication, and they wouldn't even do that!

Now American citizens either have rights or they don't. Which is it?

The Appeals Court evaded every single issue in the case, including the Commission's three technicalities. These concern the cut-off date in the law, the Texas lawsuit that cannot be pursued, and the problem of damages.

I think I am supposed to wait and cover these things under 1h) argument.

1f) State court judgment: Does not apply.

1g) How federal questions arose: Federal jurisdiction began with the Commodity Futures Trading Commission under the Commodity Exchange Act. The first court then was the Appeals Court, under the appellate procedure in the CFTC Rules Booklet drawn from Title 7, Chapter 1, Section 18, paragraph g, U. S. Code, 1976 edition, Volume I, page 884 cited above.

I am not a lawyer, and I do not know how to explain properly how the federal questions were raised. (In fact, I don't have the slightest idea what all those technical terms mean.) Would it be correct to say that I raised them by argument? Or that the agency and the court raised them by ignoring the

wording of the law and the agency's own rules? The two Appeals Court rulings and the three CFTC rulings appended herewith ought to cover this matter to the Court's satisfaction, since they are the only rulings that have been made. But if not, will the Court *please* accept the section below entitled "argument" in lieu of a technical answer. And description of the case in le) above.

These questions are indeed timely and properly raised, because they grew out of the complicated circumstances that have landed us in this morass. I have shown that both the Appeals Court and the federal agency have committed errors that no one but the Supreme Court can remedy.

1h) Argument: To begin with, let us address the Commission's three technicalities. First that pesky date in the law — January 23, 1975.

The Commission says the law bars consideration of *trades* or *transactions* that took place before that date. But that's not what the law says at all. The law uses the word *claims,* and our claim was submitted well within the deadline.

The Congress is practically made up of lawyers, and so are their staff, so they must have known what the word "claim" means. It means a demand or assertion of one's rights, and that meaning has been established in legal usage for at least 700 years. We cited more than a dozen dictionaries, both to the CFTC and the Appeals Court, but neither one paid the slightest attention.

The word "claim" cannot possibly be defined as a commodity trade!

Lewis Carroll put it very well: " 'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone,'it means just what I choose it to mean —

neither more nor less.' "

If the Congress had wished to use the word "trades" or "transactions" or the phrase "cause of action," they could have done so.

Next the Texas civil suit. Yes, it is true that the CFTC Rules bar consideration of a case in which a civil suit is outstanding, *but* their own Rule 12.32 cited above warns that the reparation procedure could be terminated at any time and says that if that happens it shall be "without prejudice to the right of the complainant to seek such alternative forms of relief as may be available to him." (Cited above.)

Well, if we had ever withdrawn the lawsuit and then gotten terminated by the CFTC, *we would have no legal redress.* We have stressed this point over and over to both the agency and the Appeals Court, and the investigative staff grasped it immediately.

We have to leave that messed-up lawsuit on the books until we find out whether the federal government will or will not perform its lawful duty to adjudicate the case, but we don't even know whether that thing can be salvaged if we do get left with nothing else. That's the problem.

You see, for reasons outlined above under description of the case, that civil suit is so incompetently drawn that it contains about a couple of statements that *aren't even true,* and the damages asked are grossly inadequate. It cannot possibly be taken to court as it stands, and we have no idea whether we could get it changed nor even how to try. But if we ever once lift a finger to find out, the CFTC will kick us out for good.

If you think we need a lawyer, you're right! —or wrong; after all, it was lawyers that got us into this fix. But even if we weren't gun-shy of the local talent, we plain can't afford one now. This case has pressed us to the wall.

We have both stated and demonstrated our good-faith desire to choose the Reparation Procedure instead, and *we have offered to withdraw the suit in return for a guarantee of adjudication.* — After all, if I thought I could pursue the lawsuit, I could've already won it and collected triple damages under Texas law. But I am not a lawyer and do not know one thing about courtroom procedure, much less the tricks.

Since we *have not* and perhaps *cannot* pursue this civil litigation to a decision, it could not possibly constitute a waiver of the reparation procedure, by the Commission's own rules. (See two orders appended herewith, pp viii and xii.)

I seriously wonder if anyone has bothered to read the legal papers that I have worked with such labor and strain to prepare, for it's been just like talking to a wall!

The third technicality is damages. It is true that Hutton did, a year later, after we'd hired a lawyer, finally offer $1000 damages. But there were two things wrong with that. One was that we had already begun to incur additional damages from their refusal to settle, and the other is that inflation had hit 12% and so $23,000 in 1975 was not as big as $22,000 in 1974. In short, their offer did *not* "make us whole."

When the United States government itself officially states the proven fact that the dollar is worth less than it used to be, by a certain percentage at a certain time, it is hard to see how this federal agency can maintain the fiction that it has remained the same. If a boy steals a string of catfish, you don't let him pay it back with a string of minnows, do you?

As to the additional damages, they have far outstripped the original commodity loss, from which

they directly and immediately ensued.

You remember that our broker had for years been handling our stock market account, so he knew that almost all of our portfolio lay in South African gold mines, which had quadrupled to about $125,000 at the time we bought the commodity account. In fact, we bought it because we were looking for an opportunity to begin moving out of South Africa.

He also knew that we had used our reserve fund to buy the commodity account. (That's how safe we thought it was.) So when the commodity fraud occurred, it trapped us in South Africa because those dividends and my mother's Social Security were — and are — our only source of steady income.

For months we kept expecting a settlement momentarily, and Hutton finally stalled us until the whole portfolio collapsed. In fact, this commodity fraud absolutely froze all our financial affairs; we were prevented from taking timely action in a number of ways and other losses also ensued. To put it another way, it's been just like a bottomless hole swallowing up everything we've got. And if South Africa goes up in flames and the Social Security System goes broke, what will become of us? But nobody will listen!

The administrative law judge said the reparation law does not provide for anything but commodity losses, but that's not what it says. It says "the Commission shall ... determine the amount of damage, if any, to which such person is entitled as a result of such violation." (Reference cited above.) Well, these are damages resulting from such violation.

We asked the Appeals Court to adjudicate the whole case, damages and all, or order the CFTC to do so, and they just dodged the issue. They also ignored the obvious possibility that the large damage claim would provide a very understandable motive for

suborning the lawyers and other personnel if that did in fact occur.

We believed that all three of these technicalities had been decided in our favor at the outset, because otherwise why did the Commission lead us on through all the paperwork? Paragraph (b) of Section 18, cited above, provides for an investigation first and allows the complaint to be served upon a respondent only "if in its opinion the facts warrant such action." Paragraph (a) right above it says the same thing: "if, in the opinion of the Commission, the facts therein contained warrant such action." (Cited above.)

In regard to the cutoff date, the investigative staff thought the entire period of active trading might be regarded as a continuing scheme to defraud, and we might additionally point out that Commodity Management Systems obstinately continued to regard us as their customer throughout the entire one-year subscription period, which did not end until May, 1975, and continued to mail us computer printouts of the model account that bore our name and our broker's name at the heading, despite the fact that they knew we had been forced off their program.

If *they* regarded us as their customer throughout that time, why won't the CFTC?

(By the way, would sending us their computer printouts by U. S. Mail be considered use of the mails to defraud?)

What the CFTC did by grabbing four trades to hang onto — with a stay, at that! — and dismissing the rest was in practical effect to rob us of our right to adjudication, as herein argued.

But when we appealed to the 5th Circuit Court to rescue us from this limbo, the Court insisted that the agency had not issued a "final order"! Yet the law starts out by saying, "Any order of the Commission entered hereunder shall be reviewable on petition

of any party aggrieved thereby by the United States Cout of Appeals" (Cited above.) *Any* order, not just final orders.

And when the Court allowed Hutton to intervene and dismissed us, and we quite naturally asked them very respectfully what we must do to get adjudicated, they wouldn't even tell us.

Therefore, we frantically petition the Supreme Court for appropriate relief. We feel that we have been harassed, we believe that justice has been obstructed, and we know good and well that our rights have been violated and we have been denied due protection of the laws.

So we place our trust in the Supreme Court, the only tribunal capable of thwarting this miscarriage of justice, and we thank the Justices for their help.

1i) No opinions have ever been rendered. That's our problem; we cannot enforce our civil right to adjudication of the case in its entirety, as provided by law. However, we are appending the two Appeals Court rulings and the three CFTC rulings.

1j) Review of state court: Does not apply.

2. Rule 39 complied with to the best of my ability, as I have never seen one of these documents and pray the Court to accept this one.

3. No brief included.

4. I have *striven* to present this petition with the required accuracy, brevity, and clearness. *Please* accept my effort.

5. Does not apply.

Most respectfully submitted,

Laura Bernice Barker

Laura Bernice Barker,
appearing for myself
and my mother, the
plaintiffs

Affidavit of service enclosed. Have I interpreted paragraph 4 of Rule 21 correctly? Because one defendant was granted the right to intervene at the Appeals Court level but the other did not apply, does that make one a party to this present proceeding and the other not?

January 17, 1979

APPENDIX
United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK
January 3, 1979

Ms. Laura B. Barker
1700 Lucile Street
Wichita Falls, TX 76301

Re: No. 78-3141 - Laura and Mamie Barker v. Commodity Futures Trading Commission

Dear Ms. Barker:

In light of this Court having dismissed the above appeal and having denied your motion to reverse the Court's dismissal order of November 3, 1978, this is to advise that any further review in this appeal should be made directly to the United States Supreme Court by the filing of a petition for writ of certiorari with that court.

Accordingly, no action will be taken by this Court wit respect to petition to respect plaintiffs' civil rights.

Very Truly Yours,

EDWARD W. WADSWORTH, Clerk

BY__
Barry W. Stiebing
Deputy Clerk

BWS:net

cc: Mr. Mark D. Young
Mr. Jack M. Weiss

FILED December 21, 1978
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3141

LAURA and MAMIE BARKER,
Petitioners

versus

COMMODITY FUTURES TRADING COMMISSION
Respondent.

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On Petition for Review of An Order of the Commodity Futures Trading Commission

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Before CLARK, GEE and FAY, Circuit Judges.
BY THE COURT:

IT IS ORDERED that petitioners' motion to reverse the Court's dismissal order of November 3, 1978, is DENIED. Petitioners, appearing pro se, beseech us eloquently and with obvious sincerity either to adjudicate their cause or to advise them as to what their future course of legal action should be. Regrettably, we can do neither. We are barred from doing the former by the want of exhaustion of remedies and a final administrative order, from the latter by the impropriety of our offering private legal advice.

FILED November 3, 1978
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3141

LAURA and MAMIE BARKER,
Petitioners,

versus

COMMODITY FUTURES TRADING COMMISSION
Respondent.

- - - - - - - -

On Petition for Review of An Order of the Commodity Futures Trading Commission

- - - - - - - -

Before CLARK, GEE and FAY, Circuit Judges.
BY THE COURT:

IT IS ORDERED that the motion of E. F. Hutton and Company, Inc. for leave to intervene is GRANTED.

IT IS FURTHER ORDERED that the motion of E. F. Hutton and Company, Inc. to dismiss the petition for review is GRANTED, for want of a full exhaustion of administrative remedies as evidenced by a final administrative order disposing of all of petitioners' claims.

IT IS FURTHER ORDERED that petitioners' motion to expedite the petition for review is DENIED as moot.

FILED August 31, 3[09] PM, 1978
UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

Laura Barker and Mamie Barker
v.
Commodity Management Systems, Inc., and E.F. Hutton & Co., Inc.

CFTC Docket No. R 77-96

ORDER GRANTING COMPLAINANTS' REQUEST FOR CLARIFICATION

On June 29, 1978, the complainants filed with the Hearing Clerk a motion requesting that the Commission clarify the June 21, 1978 Order in which we vacated the Administrative Law Judge's order of dismissal and stayed the proceeding. Although the complainants' motion is captioned "Request for Clarification," it appears that complainants actually seek a ruling on one of the substantive issues raised in the proceeding, namely whether the Commission has jurisdiction over those portions of the complaint which arise out of transactions which occurred prior to January 23, 1975. As we stated in our June 21 Order, we did not reach that jurisdictional issue in making our determination to vacate the initial decision and stay the proceeding. However, we have determined to grant complainants' request that we rule on the jurisdictional issue to enable complainants to make the most considered decision possible as to whether to pursue this matter or the pending civil litigation which currently bars our consideration of the merits of this complaint.

Section 12.21 of the Commission's Reparation Rules, 17 C.F.R. 12.21 (1977), provides, *inter alia,* that no application for the institution of a reparation complaint before the Commission "shall be considered with respect to claims that arise prior to January 23, 1975."[1] A review of the facts leads us to conclude that the complainants' cause of action here mainly involves trades executed prior to January 23, 1975. Thus, except for four trades,[2] the Commission has no jurisdiction to entertain complainants' claim, even were the complainants to withdraw the pending civil litigation which currently bars our consideration of this matter.

For the reasons stated above, the Commission hereby ORDERS that those portions of the complaint which allege damages arising out of trades effected prior to January 23, 1975, are dismissed. However, as to the portions of the complaint arising out of trades effected January 23, 1975, the proceeding is stayed until further Order of the Commission.

By the Commission (Vice-Chairman SEEVERS and Commissioners DUNN, MARTIN and GARTNER). Chairman BAGLEY not participating.

Gary L. Seevers
Vice-Chairman
Commmodity Futures Trading Commission

Dated: August 31, 1978

[1]Section 14(i) of the Commodity Exchange Act, as amended, 7 U.S.C. 18(i), provides that

The provisions of this section shall not become effective until one year after the date of its enactment: *Provided,* That claims which arise within nine months immediately prior to the effective date of this section may be heard by the Commission after

such one year period.

The reparation section was enacted on October 23, 1974. Thus, the earliest reparation claims authorized by the Act are those which arose on January 23, 1975.

[2]The four trades out of which a cause of action arose after January 23, 1975 are the purchase on January 14 and sale on January 29 of one February 1975 contract of live cattle; the sale on January 28 and purchase on January 29 of one February 1975 contract of live hogs; the sale on January 24 and purchase on February 1975 contract of live hogs; and the purchase on January 29 and sale on February 3 of one April 1975 contract of live cattle.

E. F. HUTTON AND CO., INC.
CASE NO. 78-3141
EXHIBIT B

FILED JUNE 21, 2[23]p.m. 1978
UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING
COMMISSION

Laura Barker and Mamie Barker
v.
Commodity Management Systems,
Inc., and E.F. Hutton & Co., Inc.

CFTC Docket No. R 77-96

ORDER VACATING THE ORDER OF DISMISSAL AND STAYING THE PROCEEDINGS UNTIL FURTHER ORDER OF THE COMMISSION

This proceeding is before the Commission for consideration of the complainants' application for review which was filed with the Hearing Clerk on June 16, 1977. The complainants, Laura and Mamie Barker ("the Barkers") seek review of an order of the Administrative Law Judge, filed on June 2, 1977, which dismissed their reparation complaint.[1]

Upon consideration of all of the facts and issues presented by this proceeding, we have determined that the Administrative Law Judge erred in dismissing the complaint. We wish to make it clear that we not reach the issue, posed in complainants' application for review, whether or not portions of the

complaint were properly dismissed on the ground that no application "shall be considered with respect to claims that arise prior to January 23, 1975." On the contrary, we have determined to stay the proceeding after consideration of only the issue whether the Commission should take reparation jurisdiction over a claim in which a civil proceeding is pending based on the same facts set forth and against the same parties named as respondents in the complaint.

When the Reparation Rules were originally proposed, they did not contain a provision prohibiting a complainant from concurrently using both the reparation and civil judicial machinery to pursue a single claim (see 40 Fed. Reg. 55666, *et seq.*). However, as adopted, the rules contained such a prohibition. In promulgating Section 12.21 (a)(7), the Commission observed

> The Commission is of the opinion that the utilization of either an arbitration proceeding or civil court litigation is a waiver of the remedies available under the reparation procedures if the arbitration proceeding or court litigation is pursued to a final decision on the merits. In order to prevent the utilization of the reparation procedures while an arbitration proceeding or civil litigation is pending, based on the same facts set forth and against the same party or parties named in a complaint, the Commission has determined to require the complainant to set forth in the complaint any pending arbitration proceeding or court litigation based on the facts set forth and against the same party or parties named in the complaint. (12.21(a)(7)). Should such an arbitration proceeding or court litigation be pending at the time the reparation complaint is filed with the Commission, the Commission will ordinarily stay the reparation proceeding pending a decision by the arbitration panel or court.

41 Fed. Reg. 3994 (January 27, 1976).

Thus, the Commission made its position clear that it would not proceed to adjudicate any portion of a reparation proceeding in the circumstances present here and accordingly, this proceeding must be stayed. Should the complainants choose to pursue the pending civil litigation to an adjudication on the merits, the Commission will entertain a motion to dismiss the instant action. On the other hand, should the complainants obtain a dismissal without prejudice of the complaint which is pending in the state court of Texas, we will entertain a motion to reconsider the application for review and the remainder of the issues contained therein. We must observe, however, that a cursory review of the Administrative Law Judge's ruling indicates that the Administrative Law Judge was correct in dismissing those portions of the complaint which arise out of transactions occurring prior to January 23, 1975. Consequently, we admonish the complainants that, in deciding whether to pursue their claim in this or in another forum, they should consider the likely possibility that this forum will be unable to adjudicate the merits of the entire complaint. Thus, assuming the statute of limitations in the other forum is longer, it may be in the best interests of the complainants to pursue the pending civil litigation to an adjudication on the merits.

For the reasons stated above, IT IS ORDERED that the June 2, 1977 order of dismissal is hereby vacated summarily[2] and the proceeding is hereby stayed pending further Order of the Commission.

By the Commission (Chairman BAGLEY, Vice-

Chairman SEEVERS and Commissioners DUNN, MARTIN and GARTNER).

William T.Bagley
Chairman
Commodity Futures Trading Commission

Dated: June 21, 1978

[1]Specifically, the Administrative Law Judge dismissed with prejudice portions of the complaint which alleged violations of the Act based on trades in a commodity futures account which were executed prior to January 23, 1975 on the ground that pursuant to Section 12.21 of the Commission's Reparation Rules the Commission has no jurisdiction to resolve a controversy arising out of those trades. The Administrative Law Judge dismissed without prejudice the balance of the complaint noting that the complainants had asserted in their complaint that they had instituted civil proceedings based on the same facts set forth in their reparation complaint and against the same respondents and that the proceedings were pending in a Texas state court. The Administrative Law Judge cited Section 12.21 of the Commission's Reparation Rules and stated that the Commission should not take jurisdiction over claims which are the subject of pending litigation.

[2]Since the Commission has detected a clear error in the application of its Reparation Rules in this case, we have acted summarily, that is, without need of submission of further pleadings by the parties. See *Antoniolli* v. *Clayton Brokerage Co. of St. Louis,* CFTC Docket No. R 77-232, Opinion and Order of the Commission, dated January 18, 1978.

E. F. HUTTON AND CO., INC.
CASE NO. 78-3141
EXHIBIT A

Filed June 2,1977 2[45] P.M.(?)
UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING
COMMISSION

LAURA & MAMIE BARKER,

Complainants

v.

COMMODITY MANAGEMENT SYSTEMS, INC., and E.F. HUTTON & CO., INC.

Respondents

ORDER OF DISMISSAL

1. From the face of the complaint in the above-captioned proceeding, it appears that all transactions in question, with the exception of three trades, took place prior to January 23, 1975. The three trades which occurred on or after January 23, 1975 resulted in a net loss to complainants of $560.00.

2. Commission Rule 12.21 (17 C.F.R. 12.21) states, *inter alia:* ". . . no [complaint] shall be considered with respect to claims that arose prior to January 23, 1975." Under this Rule, this forum has no jurisdiction over activities which occured prior to January 23, 1975.

3. It further appears from the complaint there is, presently pending, civil litigation initiated by

complainants based on the same facts as this complaint, in the Texas state courts.

4. Commission Rule 12.21(a)[17 C.F.R. 12.21(a)(7)] requires a complainant, among other things, to state that no civil litigation based on the same facts has been instituted or is presently pending.

5. As to the aforementioned three trades over which this forum has jurisdiction, it is clear that this is a case where the exercise of jurisdiction would be improper. It bears repeating that it was the complainants who instituted the pending civil litigation. As stated by the Commission in the preamble to its Rules of Procedure relating to Reparations (17 C.F.R. ch. 1, part 12; 41 Fed. Reg. 3994, January 27, 1976):

"The Commission is of the opinion that the utilization of either an arbitration proceeding or civil court litigation is a waiver of the remedies available under the reparation proceedings if the arbitration proceeding or court litigation is pursued to a final determination on the merits."

6. It appears from the complaint that respondent E. F. Hutton & Company previously offered to restore to complainants all moneys lost via losing trades and commissions, plus $1000 (complaint, p.17). This is a reparations forum. As the name implies, the relief which may be afforded here is limited to making a complainant whole again. Making whole means, under the facts as alleged in the complaint, restoring the commodity account to what it was when opened with E. F. Hutton, plus the expenses of litigation (in this case filing fees, etc.), plus reasonable interest. The Commodity Exchange Act does not provide for punitive or exemplary damages, or for damages unrelated to violations of the Act or the Rules of the Commission. In other words, if complainants want substantially more than respondent's settlement offer, then this is the wrong forum.

7. Therefore, it should be, and hereby is, ORDERED, that this complaint be dismissed as to each allegation contained in the complaint, except for: One contract of February, 1975, Live Hogs, sold January 28, 1975 and purchased on January 29, 1975; one contract of April, 1975, Live Hogs, purchased on January 29, 1975 and sold on February 3, 1975; and one contract of February, 1975, Live Cattle, sold on January 29, 1975 and purchased February 3, 1975. The dismissal is based on a lack of jurisdiction.

8. Futhermore, it should be, and hereby is, ORDERED, that as to the transactions enumerated in paragraph No.7, above, the complaint be dismissed due to the pendancy of civil litigation in the state of Texas. This dismissal will not bar the refiling of this claim on the said three transactions should the civil litigation be terminated without a decision on the merits.

SO ORDERED.

Dated this *2nd* day of June, 1977

George H. Painter
Administrative Law Judge

Supreme Court, U. S.
FILED
MAR 13 1979
MICHAEL RODAK, JR., CLERK

No. 78-1138

In the Supreme Court of the United States

OCTOBER TERM, 1978

LAURA BARKER AND MAMIE BARKER, PETITIONERS

v.

COMMODITY FUTURES TRADING COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

JOHN G. GAINE
General Counsel

PAT G. NICOLETTE
FREDERIC T. SPINDEL
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Commodity Futures Trading Commission
2033 K Street, N.W.
Washington, D.C. 20581

In the Supreme Court of the United States

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. In 1974 Congress amended the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*, expanding its coverage to encompass almost all commodities and creating the Commodity Futures Trading Commission to administer and enforce the Act's provisions. The Act creates a comprehensive scheme for the regulation of commodity futures and related markets. One new feature of the system of regulation is the reparation procedure contained in Section 14, 7 U.S.C. 18. That section authorizes the Commission to provide an administrative forum for the adjudication of complaints by members of the public who claim to have been injured by violations of the Act or the Commission's rules, when the asserted violations were committed by persons required to register with the Commission under certain provisions of the Act.[1] If, in

[1]The Act requires registration of futures commission merchants and associated persons, floor brokers, commodity trading advisors and commodity pool operators. Sections 4d, 4e, 4k and 4m of the Act, 7 U.S.C. 6d, 6e, 6k and 6m.

the Commission's opinion, the facts alleged by a complainant warrant the institution of a proceeding, the case may be heard and decided by an administrative law judge or by the Commission itself (7 U.S.C. 18(b); 17 C.F.R. 12.101). If the Commission finds that the Act has been violated, it may enter an award directing the registrant to compensate the complainant for any damages sustained.[2]

The effective dates of the Commission's reparations authority are set forth in Section 14(i) of the Act, which provides that: "[T]he provisions of this section shall not become effective until fifteen months after the date of its enactment: *Provided,* That claims which arise within one year immediately prior to the effective date of this section may be heard by the Commission after such fifteen months period" (7 U.S.C. 18(i)).[3] The 1974 amendments were signed into law on October 23, 1974 (see 88 Stat. 1389), and Section 14 therefore did not become effective until January 23, 1976. Thus, the Commission will not consider a reparation complaint with respect to claims that arose before January 23, 1975—one year prior to the effective date of Section 14. See 17 C.F.R. 12.21.

2. On December 14, 1976, petitioners filed with the Commission a reparation complaint against Commodity Management System, Inc. and E. F. Hutton & Co., Inc. Their complaint alleged that these commodity firms had

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[2]Subject to an aggrieved party's right to seek judicial review in a court of appeals (7 U.S.C. 18(g)), the Commission's order is conclusive (7 U.S.C. 18(f)). An order awarding reparations may be enforced against the commodity professional in a district court (7 U.S.C. 18(f)).

[3]Section 14(i), as originally enacted in 1974, provided that the Commission's reparations authority would become effective one year after the date of enactment and would apply to claims arising no more than nine months prior to that date. 88 Stat. 1395. In 1975 Congress adopted Pub. L. No. 94-16, 89 Stat. 77, which amended Section 14(i) by extending the effective dates to 15 months and one year.

defrauded petitioners in connection with certain commodity futures transactions, resulting in financial injury to them. All but four of the commodity futures transactions, which petitioners alleged they entered into as a result of the unlawful conduct of these firms, occurred before January 23, 1975 (Pet. App. vi n.2).

An administrative law judge dismissed petitioners' complaint for lack of jurisdiction, both because the complaint's allegations were the subject of a pending action brought by petitioners against the commodity firms in a state court[4] and because most of the transactions occurred before January 23, 1975 (Pet. App. xi-xiii). The dismissal was without prejudice to refiling if the state case concluded without a disposition on the merits (*id.* at xiii).

The Commission vacated this order and stayed the proceeding based on the pendency of the state court action (Pet. App. vii-x). In response to petitioners' request

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[4]In order to avoid possible duplicative litigation and inconsistent rulings, the Commission ordinarily will not permit a person to utilize its administrative reparation forum to litigate a claim that is concurrently being asserted in court or arbitration. See 17 C.F.R. 12.21(a)(7). The Commission explained in adopting this regulation that:

> the utilization of either an arbitration proceeding or civil court litigation is a waiver of the remedies available under the reparation procedures if the arbitration proceeding or court litigation is pursued to a final decision on the merits. In order to prevent the utilization of the reparation procedures while an arbitration proceeding or civil court litigation is pending, based on the same facts set forth and against the same party or parties named in a complaint, the Commission has determined to require the complainant to set forth in the complaint any pending arbitration proceeding or court litigation based on the facts set forth and against the same party or parties named in the complaint. Should such an arbitration proceeding or court litigation be pending at the time the reparation complaint is filed with the Commission, the Commission will ordinarily stay the reparation proceeding pending a decision by the arbitration panel or court.

41 Fed. Reg. 3994 (1976) (citation omitted).

for clarification, the Commission issued a further order dismissing "those portions of the complaint which allege damages arising out of trades effected prior to January 23, 1975" (*id.* at v) but continuing the stay with respect to the claims that, although not time-barred, were the subject of petitioners' state court action.

The court of appeals dismissed the petition for review "for want of a full exhaustion of administrative remedies as evidenced by a final administrative order disposing of all of petitioners' claims" (Pet. App. iii).

3. The decision of the court of appeals is correct, and there is no reason for review by this Court. Section 14(g) of the Act, 7 U.S.C. 18(g), authorizes judicial review of orders granting or denying reparation awards. But judicial review generally is limited to final orders. 5 U.S.C. 702. There has been no final order here because some claims in petitioners' reparation complaint still are pending before the Commission. An order disposing of some but not all of the claims in a case is not final. The court of appeals consequently did not consider the merits of petitioners' argument that the Commission has jurisdiction to award reparations for transactions consummated before January 23, 1975, and there is no reason for this Court to consider that contention, which is, in any event, untenable.

Petitioners are free either to pursue their pending action in state court or to dismiss that action. If they dismiss their action, the Commission's order staying the reparation proceeding could be vacated. Petitioners would be able to proceed with their claim on the four futures transactions effected after January 23, 1975, and they could receive full judicial review thereafter.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JOHN G. GAINE
General Counsel

PAT G. NICOLETTE
FREDERIC T. SPINDEL
Associate General Counsels
Commodity Futures Trading Commission

MARCH 1979

DOJ-1979-03

No, 78-1138

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

Laura and Mamie Barker, Petitioners

vs.

Commodity Futures Trading Commission

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO MEMORANDUM FOR THE RESPONDENT

Petitioners are not represented by counsel. Service may be made on us at the following address:

Mrs. Mamie Nutter Barker and
Miss Laura Bernice Barker
1700 Lucile Street
Wichita Falls
Texas 76301

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1138

Laura and Mamie Barker, Petitioners

vs.

Commodity Futures Trading Commission

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO MEMORANDUM FOR THE RESPONDENT

May it please the Court, respondent's reply does not answer nor even address a single argument that I have raised.

It ignores the Commission's violation of its own rules.

It ignores the Appeals Court's violation of the law, which says <u>any</u> order of the Commission may be appealed, not

just a final order.

It ignores the legal meaning of the word "claim," --"claim" is <u>not</u> synonymous with "commodity trade"-- and while admitting that our claim was timely filed, still refuses jurisdiction over all but less than 1% of it, thereby neither accepting nor dismissing the case and neatly preventing adjudication.

Like some adamant computer, it keeps repeating that we can pursue this case in state court, when we have stated till we are blue in the face that this is <u>impossible</u> because the suit was incompetently (or perhaps criminally) drawn to contain untrue statements and we do not know if it can be changed. Nor can we make any move to find out because the CFTC will dismiss us and leave us without legal redress if we do.

Once again here in their reply they say they would adjudicate it if the law-

suit does not proceed to a judgment on its merits. Well, why don't they make good on their word? The suit is effectively halted.

Yet even then they would defy the age-old usage of the word "claim" to restrict the case to $500 and let the fraud and the churning go free!

In short, respondent's reply is a classic case of the same dense bureaucratic obtuseness that has continually blocked our civil right to get our evidence judged. We pray the Court for immediate relief from this outrage.

Respectfully submitted,
Laura Bernice Barker

appearing for myself
and my mother

Affidavit of service to CFTC, Solicitor General, and E. F. Hutton enclosed

March 16-79